

# How to Save a Constitutional Democracy: a Comment by SUJIT CHOUDHRY

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Tom Ginsburg and Aziz Huq's [How to Save a Constitutional Democracy](#) is a terrific book. In this comment, I address three issues: the important moment the book marks on the value of the comparative method to the study of American constitutionalism; the insights offered by this method to the risk of democratic erosion in the United States and how those risks might be mitigated; and the need to give greater weight than Ginsburg and Huq do to the role of federalism to counter democratic erosion.

Let me begin with method. We do not yet know how the Trump presidency will end, let alone what its longer term legacy for the practice of American constitutional democracy will be. However, its intellectual legacy is already becoming clear: a full-scale rethinking of American exceptionalism. American exceptionalism – the idea that the origin, development and practice of American constitutional democracy are unique and must be understood on their own terms, without reference to the experiences of other countries – is an assumption around which the study of constitutional law and politics in the United States is built; it is also a cornerstone of American political discourse.

But as Ginsburg and Huq argue, the Trump presidency should end this kind of scholarly and political parochialism, because (2 to 3):

many of the institutional and political dynamics apparent in the United States today can also be traced in the recent history of other liberal democracies in Europe, South America, and Asia. ... The forces at work in the United States are not ... idiosyncratic local storms or tempests ... They are the climatic conditions of our political future.

Less they be misunderstood, it bears emphasis that Ginsburg and Huq are not making an argument that comparative engagement is a platform toward constitutional convergence. Rather, the value of looking to other national experiences is that "[t]he interaction of political strategy and legal frameworks may vary with local circumstances, but patterns can also be observed across countries and continents" (2). In their methodological orientation, Ginsburg and Huq join Steven Levitsky and Daniel Ziblatt, who draw on historic examples of democratic breakdown in Weimar Germany and Argentina to offer a diagnosis of the rise of Trump and the character of the risk that he poses to the American constitutional order in [How Democracies Die](#). But while Levitsky and Ziblatt root the stability of constitutional democracy in the unwritten norms of mutual toleration and forbearance, and argue that constitutional design can do little, if anything, to ensure

the resilience of constitutional democracy in the face of a democratically-elected autocrat, Ginsburg and Huq take constitutional design seriously (207):

Our emphasis throughout is on formal constitutional rules that might mitigate erosion risk, however, and not on interventions to strengthen norms and conventions of political life through some other means.

How do Ginsburg and Huq put constitutional comparativism to work? The core question posed by Ginsburg and Huq is whether constitutional design can mitigate the risk of the breakdown of constitutional democracy, or in fact has the perverse effect of facilitating constitutional democracy's erosion or collapse – with a particular focus on the United States. The heart of *How to Save a Constitutional Democracy* lies in the application of the comparative method to this question. Through a global survey (focusing on the recent examples of Hungary, Poland, Turkey and Venezuela), Ginsburg and Huq develop a taxonomy of mechanisms whereby democratic erosion tends to occur (what I would term an “autocrats’ toolkit”): constitutional amendments altering basic governance arrangements, the elimination of checks and balances (asserted by the courts and the legislature), the centralization and politicization of executive power, the shrinking or distortion of the public sphere, and the elimination or impairment of political competition (ch. 4).

Ginsburg and Huq persuasively argue that the American constitution comes up wanting, because it does little to offset these risks and may in fact increase them (ch. 5). Some of these shortcomings are the product of design, while others have arisen because of judicial interpretation. Many are familiar. The relatively rigid requirements for constitutional amendments under Article V are a bulwark against what David Landau has helpfully called “[abusive](#)” amendments that erode democracy. On the other side of the ledger, the power of state legislatures to gerrymander Congressional districts for nakedly partisan ends with few constitutional constraints, and the responsibility of elected politicians at the state level for election administration, both threaten political competition.

But others have not hitherto been linked to the problem of democratic erosion, and it is illuminating to view them in a new light. One example is the combination of judicial doctrines that allow for broad delegations by Congress to the executive, alongside other doctrines that sharply limit Congressional power to retain oversight over exercises of delegated authority. Taken together, the result has been to increase the scope of Presidential control over the executive, and the politicization of the bureaucracy, and simultaneously, to fetter the ability of Congress to oversee the new powers it has delegated. Ginsburg and Huq helpfully define constitutional democracy to include the “bureaucratic rule of law” – that is, the impartial administration of statutes and regulations by career civil servants to implement legislative policies, without fear or favour. An autocratic president could undermine the rule of law by directing the bureaucracy to wield extensive delegated authority to favour supporters and punish political opponents, with little Congressional oversight – and for which it is very difficult to seek a judicial remedy.

Another example is the federal judiciary. In Poland and Turkey, the governing parties have embarked upon the wholesale capture of the courts, in order to

weaponize them against their political opponents. As Ginsburg and Huq note, the American constitutional experience also furnishes examples of weaponized courts aligned with the ruling party — the use by the Federalist Party of the 1798 Alien and Sedition Acts to persecute its ideological opponents, by deploying a federal judiciary packed with its supporters. But they also argue that even if the federal courts were not captured by a political party, they may lack “the necessary motivation to be robust shields against democratic erosion” (146). In the face of a “concerted program of democratic erosion”, the executive would persistently oppose the federal courts, which the evidence suggests would respond through quiescence in the interests of institutional self-preservation. Thus, the greatest risk posed by courts may not be partisan capture, but indifference and self-interest.

Ginsburg and Huq propose a number of solutions for the American context, which presuppose its existing constitutional system (ch. 7) — again, some familiar, some not. These measures are to create new institutions (independent boundary delimitation commissions, professional non-partisan election administration), renovate existing ones (Congressional “opposition rights” to enhance oversight, Congressional cabinet members to soften partisan cleavages, enhancing bureaucratic autonomy), and doctrinal (most notably, a judicially manageable standard for partisan gerrymanders). Rather than engaging in an analysis of the instrumental rationality and political feasibility of these solutions, I instead examine the role of federalism, as a target of would-be autocrats because of its role as a potential check on democratic erosion, and how it has fared in that role in the United States.

Federalism — or devolution, a more capacious term that encompasses a broader variety of forms of decentralized government including municipalities — is largely missing from Ginsburg and Huq’s analysis. In an “aside” (at 148 to 150), they dismiss the potential of federalism to check democratic erosion, because its effects are not necessarily uniformly positive. While they concede that states and municipalities could potentially “provide platforms for alternative, anti-authoritarian politicians”, those political units may also become “authoritarian enclaves” that would not thwart and might increase the risk of democratic erosion through the diffusion of autocratic modes of governance and political movements.

To be sure, authoritarian enclaves are a dark chapter in the history of postbellum American South, which only came to an end through federal government intervention, [in Robert Mickey’s masterful account](#). And Edward Gibson [has insightfully elucidated the political dynamics that maintain authoritarian enclaves in otherwise democratic federations](#), drawing on the examples of Argentina and Mexico, in addition to the United States. Nevertheless, I think Ginsburg and Huq are too quick to dismiss the potential of federalism to check democratic erosion. One of the striking features of contemporary American is the role played by state governments led by Democratic governors in leading the opposition to President Trump, with respect to a broad range of issues and in a variety of institutional fora. Governor Andrew Cuomo of New York has been particularly vocal in his opposition to President Trump. In California Governors Jerry Brown, and his successor, Gavin

Newsom, have gone even further, and embraced the “resistance” label, and crafted their governing agendas in direct opposition to those of President Trump.

How should we understand federal-state relations during the Trump administration in light of how Governors Brown, Cuomo and Newsom have framed their agenda as opposing that of President Trump? To a considerable extent, these clashes merely represent partisan disagreement between a Republican President and Democrat state governors, on issues such as climate change and immigration, where the parties have sharply different views. The fact that these disagreements have led state governors to pursue legal challenges to decisions of the Trump administration – for example, the travel ban and climate change litigation – does not change their partisan character. Indeed, legal challenges brought by state governments to federal policies when the other party controls the White House is nothing new; during the Obama administration, Republican state governments challenged both Deferred Admissions for Childhood Arrivals (DACA) and the Affordable Care Act.

But on closer examination, states with Democratic governors are playing roles that Ginsburg and Huq assign to the other branches of the federal government in checking democratic erosion, and/or seem to make up for those branches’ present inability to do so in a manner functionally similar (albeit not equivalent) to what they prescribe. Let us begin with litigation. In addition to challenges to Trump administration policies, Democratic state governments have also brought suit in the federal courts alleging that President Trump is in breach of the Emoluments Clauses of the Constitution. [As I have explained](#), these clauses are checks against official corruption, by prohibiting the President from receiving private financial benefits for holding an elected office. They therefore should be understood as constitutional commitments to the bureaucratic rule of law — i.e. impartial public administration without fear or favour. State governments, deploying the machinery of the federal courts, are serving a role that might be performed by Congress, either by a Democratic minority wielding opposition rights, or by the newly elected Democratic majority in the House of Representatives.

Ginsburg and Huq identify the centralization and politicization of executive power — the phenomenon of what Elena Kagan terms “[presidential administration](#)” — as a tool of democratic erosion. But American federalism constitutionally entrenches the fragmentation of executive power, by dividing it between the federal government and the states. This makes the centralization of executive much more difficult than it would be in a unitary state. Even in a core area of federal authority — immigration — the reality on the ground is what Cristina Rodríguez perceptively calls “[immigration federalism](#)”, with states and localities playing a role in federal removal policies, and in determining how immigrants, regardless of status, can integrate into American life (e.g. drivers’ licences, access to education, etc.). On this front, California’s sanctuary laws (which sharply limit the ability of local law enforcement to report undocumented immigrants to federal authorities), and the extension of benefits toward undocumented immigrants (e.g. financial aid for higher education), underline the potential scale and impact of state executive power.

Finally, [as I have previously argued in the context of South Africa](#), federalism may enhance political competition, because it multiplies the opportunities for electoral

choice and political competition, by increasing the number of governments that must be democratically elected, and by creating different political majorities empowered to elect different governments. The proliferation of opportunities to wield power allows political parties that lose at the federal level to win at the state level through the support of a different political majority. Moreover, states provide important political resources to parties that strengthen their ability to compete federally. The possibility of wielding power enhances the ability of parties to recruit and train political elites. The expertise developed from political mobilization at the state level can be transferred to federal elections. Finally, governing at the state level provides parties with the advantages of incumbency, such as greater public profile and the ability to shape public policy to enhance their base of political support.

Perhaps the most dramatic example of the effect of federalism to increase political competition at the national level is India. The Congress Party dominated Indian politics for the two decades after independence, winning continuous majorities at the national level as well as majorities in most states. In the 1967 elections, Congress faced a successful challenge from new regional parties at the state level, and lost power in eight states. Victories by regional parties deprived the Congress Party of the power of patronage and limited its ability to mobilize electoral support, which culminated in outright losses by Congress in 1977, 1989 and 1996. So too with the Partido Acción Nacional (PAN) in Mexico, which won the Presidency in 2000 after winning the governorships in several states between 1992 and 2000, and the Pakatan Harapan (PH) in Malaysia, which recently wrested power from the United Malays National Organization (UMNO) in elections in May 2018, [building on opposition victories in five states in 2008](#).

In India, we now see the same process unfolding, with the Congress Party's recent victories in state elections in December in Chhattisgarh, Madhya Pradesh, and Rajasthan – the heart of the Hindi-belt – were viewed as electoral contests of India-wide significance. State-level elections turned into a referendum against the policies of Bharatiya Janata Party-led central government, especially on the crisis facing India's small farmers and demonetization. As Pratap Mehta [acutely observes](#), these state-level electoral results have broken the BJP's dominance of the Hindi-belt, which is essential to its national electoral prospects in 2019. Indian federalism is promoting political competition.

In the American context, it is worth observing that several Presidents in the post-war era had been state governors from the opposition party – both Democrat (Presidents Carter and Clinton) and Republican (Presidents Reagan and George H. Bush) – deriving the benefits of incumbency to contest for power nationally. To be sure, federalism is no guarantee of increased political competition, as the sobering examples of authoritarian enclaves remind us. But as [I recently argued in this blog](#), constitutional design needs to steer a pragmatic middle course between constitutional idealism and nihilism – i.e. that thoughtful and careful design can “save” constitutional democracy from erosion or that it can do nothing at all. Rather, all good constitutional design can do in the face of a determined autocrat with successive electoral victories is to reduce the likelihood of democratic erosion, principally by creating delays — “speed bumps” — in democratic erosion, which can

serve as focal points for the defenders of constitutional democracy to mobilize public opinion. As adherents to this view of constitutional design, and as advocates of redundancy to provide for multiple pathways to check democratic erosion, I hope that Ginsburg and Huq will view my arguments for federalism as a friendly amendment to their impressive arguments.

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